No. 83937-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JAMES R. CARY, MARY ALICE CARY, JOHN E. DIEHL, and WILLIAM D. FOX, SR.,

Petitioners,

v.

MASON CONSERVATION DISTRICT,

Respondent,

and

MASON COUNTY,

Defendant.

# EVERGREEN FREEDOM FOUNDATION'S AMICUS CURIAE MEMORADUM IN SUPPORT OF PETITION FOR REVIEW

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This case arises from a *pro se* challenge to a special assessment imposed by Mason County for the benefit of the Mason Conservation District pursuant to RCW 89.08.400 (hereinafter "conservation district charge"). After the plaintiffs prevailed in the trial court, the Court of Appeals reversed in a published decision.[1] Despite the fact that the conservation district charge was indisputably enacted as a special assessment, not subject to the "tax/fee" framework set forth in *Covell v. City of Seattle*, 127 Wn.2d 874 (1995), the Court of Appeals nonetheless applied that framework and held that the conservation district charge was a valid fee under *Covell*. The Court of Appeals also held that the conservation district charge need not include any amount based on acreage, despite RCW 89.08.400(3)'s express command to the contrary.

These holdings conflict with decisions of this Court in several respects. In particular, the holdings significantly blur the distinctions between special assessments, taxes, and fees set forth in the Washington Constitution and this Court's case law, and circumvent the constitutional restrictions placed on special assessments and local taxes. Moreover, the Court of Appeals' decision bears upon the validity of conservation district special assessments covering at least eleven other counties.[2] Accordingly,

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[1] *See Cary v. Mason County*, 152 Wn. App. 959, 964-66 (2009).

[2] *See* Washington State Conservation Commission Map of Conservation Districts with

review by this Court is warranted under RAP 13.4(b)(1), (3), and (4).

## ARGUMENT

### A. A valid special assessment is neither a tax nor a fee, and is not properly analyzed under the *Covell* framework.

Under this Court's *Covell* framework, most governmental financial charges may be categorized as a tax or a fee. "Taxes . . . are compulsory payments that do not necessarily bear any direct relationship to the benefits of government goods and services received," and may be used for any legitimate governmental purpose.[3] Because of this, taxes are subject to an array of constitutional limitations.[4] Moreover, local governments lack inherent authority to tax; rather, such authority must be expressly granted by the constitution or statute.[5] On the other hand, "[l]ocal governments have authority under their general article XI, section 11 police power" to impose fees akin to charges for services rendered,[6] generally free from the constitutional constraints applicable to taxes.

Not all governmental charges fall into the tax/fee dichotomy, however – a point the Court of Appeals utterly failed either to grasp or

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Special Assessments, *available at* http://www.scc.wa.gov/index.php/Conservation-Districts-with-Special-Assessments.html (last visited Feb. 4, 2010).

[3] Hugh Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 337-39 (2002-03).

[4] *Id.* at 340-41 (discussing various constitutional limitations).

[5] *See Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 366 (2004).

[6] *See Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 804 (2001).

address below. One exception to the dichotomy is the special assessment. This Court has long been clear that a special assessment is neither a tax nor a fee and, as such, is not subject to analysis under the *Covell* framework.[7] Instead, a special assessment is a distinct type of governmental charge of "ancient lineage" that has its own requirements, limitations, and constitutional underpinnings.[8]

In general, special assessments "support the construction of local improvements that are appurtenant to specific property and bring a benefit to that property substantially more intense than is conferred on other property" in the jurisdiction.[9] Traditionally, these improvements have been capital improvements such as local extensions of water and sewer lines.[10] More recently, the Court has held that some specially targeted services may also support a special assessment.[11]

This Court has addressed the requirements for and limitations on

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[7] *See Okeson v. City of Seattle*, 150 Wn.2d 540, 554-55 (2003) (distinguishing challenged street lighting charge from charges authorized under special assessment statute); *Covell*, 127 Wn.2d at 889 (analyzing whether challenged street utility charge was a valid special assessment outside of the tax/fee framework); *Berglund v. City of Tacoma*, 70 Wn.2d 475, 477 (1967) ("Special assessments . . . are not deemed taxes . . . ).

[8] *See Heavens v. King County Rural Library District*, 66 Wn.2d 558, 563 (1965); WASH. CONST. art. VII, § 9.

[9] *Bellevue Associates v. City of Bellevue*, 108 Wn.2d 671, 674-75 (1987); *accord Heavens*, 66 Wn.2d at 563.

[10] *See* Philip Trautman, *Assessments in Washington*, 40 WASH. L. REV. 100, 108 (1965).

[11] *See City of Seattle v. Rogers Clothing for Men, Inc.*, 114 Wn.2d 213, 223-28 (1990) (upholding assessments on downtown businesses for advertising and maintenance services).

special assessments in a long line of cases. Perhaps most importantly, the improvement underlying a special assessment "must confer a special benefit on the property sought to be specially charged with its creation and maintenance, over and above that conferred generally upon property within the municipality."[12] "The benefit to the land must be actual, physical and material, not merely speculative or conjectural."[13] A corollary to this is the principle that "property not specially benefited by a local improvement cannot be assessed" at all.[14]

The Court of Appeals decision completely fails to address these principles and, as will be explained below, the conservation district charge challenged here contravenes many of them.

**B. The conservation district charge was purported to be a special assessment, not a tax or fee.**

The record is clear that Mason County Ordinance 121-02 characterizes the charge being imposed as a special assessment, and not a tax or fee. Mason County Ordinance 121-02 was expressly adopted pursuant to RCW 89.08.400, which authorizes county legislative bodies to

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[12] *Okeson*, 150 Wn.2d at 555 n.3 (quoting *Ankeny v. City of Spokane*, 92 Wash. 549, 560 (1916)); *see also Rogers*, 114 Wn.2d at 226 (quoting Eugene McQuillin, 14 MUNICIPAL CORPORATIONS § 38.11 (3d rev. ed. 1987)): "Laws recognize a distinction between public improvements which benefit the entire community and those local in their nature which benefit particular real property or limited areas. . . . [I]f [an improvement's] primary purpose and effect are to benefit the public, it is not a local improvement, although it may incidentally benefit property in a particular locality."

[13] *Heavens*, 66 Wn.2d at 563; *see also Bellevue Associates*, 108 Wn.2d at 675 (same).

impose special assessments for the benefit of conservation districts within their borders.[15] Given this clear reference – and the clear distinction between special assessments, fees, and taxes described above – the Court of Appeals' conclusion that the conservation district charge is a fee, rather than a special assessment, simply is not credible.

### C. The conservation district charge is not a valid special assessment.

The Mason Conservation District covers the entirety of Mason County outside the City of Shelton.[16] Thus, the conservation district charge is essentially imposed on all "non forested" private land in Mason County outside the City of Shelton (CP at 113), and funds water resource protection programs and activities across the County. These programs include citizen training and education, septic and water quality testing, and investigation of pollution complaints.[17] Services are available upon request and without charge. *See* CP at 108-110. Two-thirds of the revenue generated by the conservation district charge (after administrative

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[14] *Heavens*, 66 Wn.2d at 563 (quoting *In re Jones*, 52 Wn.2d 143, 145 (1958)).

[15] The ordinance provides in part: "There shall be an assessment for natural resource conservation as authorized by RCW 89.08.400 in the amount of $5.00 per non forested land parcel with $0.00 fee per acre assessed for ten years starting 2003 and continuing through 2012." CP at 97 (Mason County Ord. No. 121-02 (Sept. 3, 2002)).

[16] *See* CP at 108, 142-43. Shelton opted out of the Conservation District after the conservation district charge was imposed.

[17] *See* CP 103-05 (listing specific activities and services funded by conservation district charge); *see also* CP 59-60 (goal of charge "is to be able to provide assistance to the residents of Mason County unilaterally" across the County, rather than selectively).

expenses) is transferred to the Mason County Department of Health Services; the other third is retained by the District.[18]

Given all of this, and the requirements for and limitations on special assessments described above, it is plain that the conservation district charge is not a valid special assessment. There are several reasons for this. Most obviously, the benefits conferred in exchange for the conservation district charge are not local in nature – no property receives any benefit "substantially more intense than is conferred on other property" in the jurisdiction.[19] Rather, the benefits consist of general governmental services available to just about anyone in the County.

In addition, the county ordinance makes no attempt to classify properties according to the benefits conferred. Instead, each parcel – regardless of its size, impervious surface coverage, or other characteristics – is simply assessed a flat, $5.00-per-parcel charge. Thus, a five-acre paved parking lot is treated exactly the same as a pristine, two-acre

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[18] *See* CP at 98. Despite the Conservation District's ability to enter into interlocal agreements, this arrangement is problematic under RCW 89.08.400(4). That statute requires that all special assessment funds, after administrative costs, "shall be transferred to the conservation district and used by the conservation district in accordance with this section." *See also* Att'y Gen. Op. 2006 No. 8, at 1 ("Conservation district special assessments are . . . not available for use by the county for other purposes."). Yet the record is clear that the charge was enacted, at least in part, to help solve the *County's* (rather than the Conservation District's) "thorny budget problem[s]." CP at 112.

[19] *Bellevue Associates*, 108 Wn.2d at 674-75; *accord Heavens*, 66 Wn.2d at 563. *See also Okeson*, 150 Wn.2d at 555 n.3 (quoting *Ankeny*, 92 Wash. at 560); *Rogers*, 114 Wn.2d at 226 (quoting McQuillin, *supra*, § 38.11).

meadow. Both the general principles underlying special assessments and the authorizing statute forbid this.

RCW 89.08.400(3) provides that "[a] system of assessments shall classify lands in the conservation district into suitable classifications according to benefits conferred or to be conferred by the activities of the conservation district," and that "[a]n annual assessment rate shall be stated as *either* uniform annual per acre amount, *or* an annual flat rate per parcel *plus* a uniform annual rate per acre amount, for each classification of land." (Emphasis added). The requirement of a per-acre amount makes sense, inasmuch as it (to some degree) helps correlate the amount assessed with the benefit conferred. Here, however, the County expressly rejected any per-acre amount. CP at 59-60, 63, 97. This violates the plain language of the statute – as noted by the Attorney General in his amicus brief to the Court of Appeals below[20] – as well as the State Conservation Commission's interpretive regulations.[21]

It is expected that the Conservation District will argue that the Court is precluded from reviewing any of this by RCW 89.08.400(2) which provides that the County's findings regarding special benefits are

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[20] *See* Am. Cur. Br. of Wash. State Conservation Comm'n, Wash. Ct. App. No. 37981-3-II, at 3-9 (Sept. 11, 2009).

[21] *See* WAC 135-100-080 ("**The uniform per-acre amount must be greater than zero cents per acre** and cannot exceed ten cents per acre." (emphasis added)).

"final and conclusive." However, as the Court of Appeals recognized below, the scope of this provision is rather limited.[22] Moreover, amicus does not question whether the conservation district charge will exceed the benefit to any particular parcel. Rather, amicus questions the fundamental validity of the County's entire scheme. Under this Court's jurisprudence, special assessments must be based on intensive, localized benefits and measured in some proportion to the benefits conferred. The conservation district charge violates these principles, inasmuch as it is based on generalized, county-wide governmental services and is in no way correlated to the benefits conferred, given its flat, per-parcel nature. The Court should accordingly accept review and hold the charge invalid.

### D. Even if *Covell* is applicable here, the conservation district charge does not qualify as a fee under this Court's case law.

Even if the *Covell* framework is applicable here, a faithful application of this Court's precedents compels the conclusion that the conservation district charge is not a valid fee, but is an unlawful tax.[23]

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[22] *See Cary*, 152 Wn. App. at 967. Moreover, inasmuch as the fundamental requirements of a special assessment are of constitutional magnitude, the Legislature may not statutorily deprive the Court of its ability to review the constitutional validity of a purported special assessment. *See Scott Paper Co. v. City of Anacortes*, 90 Wn.2d 19, 33 (1978); *State ex rel. Pacific Tel. & Tel. Co. v. Dep't of Pub. Serv.*, 19 Wn.2d 200, 218 (1943); *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 415 (1936).

[23] Any argument that the conservation district charge could constitute a valid tax is entirely baseless. The charge is a flat, $5.00 per parcel charge imposed on the mere ownership of property. As such, it is a property tax not uniformly based on each parcel's value and is unconstitutional under article VII, section 1 of the Washington Constitution. *See, e.g., Arborwood Idaho*, 151 Wn.2d 359. *See also* CP at 110 (Conservation District

In particular, the conservation district charge fails the first and third *Covell* criteria.[24] The first criterion asks whether the primary purpose of the charge is to raise money (in which case the charge is likely a tax) or whether it is to regulate the activities of those paying the charge by providing them with a service in exchange (in which case it is likely a fee). The Court of Appeals held that the conservation district charge is a fee because it was to be used for various water resource conservation activities and services.[25] But, contrary to this Court's case law, this analysis completely fails to address whether the payers of the charge are using or benefiting from these services, nor does it differentiate the extent to which various payers are using or benefiting from these services.[26]

Similarly, the third criterion asks whether a "direct relationship" exists between the charge either a service received by the payer or a burden to which they contribute. "If no such relationship exists, then the

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newsletter noting that "[i]f you pay property taxes, you are likely to pay the assessment.")

[24] *See Samis Land Co.*, 143 Wn.2d at 806 (listing *Covell* criteria).

[25] *See Cary*, 152 Wn. App. at 964-65.

[26] *See Lane v. City of Seattle*, 164 Wn.2d 875, 880, 883 (2008) (primary purpose of hydrant charge on water ratepayers was to raise revenue where charge did not regulate hydrant or water usage); *Arborwood Idaho*, 151 Wn.2d at 362-63, 371 (primary purpose of citywide ambulance service charge was to raise revenue because charge did not regulate use of the service); *Okeson*, 150 Wn.2d at 552-53 (primary purpose of street lighting charge was to raise revenue where there was no relationship between payer's electricity consumption and amount of energy used by street lights); *Covell*, 127 Wn.2d at 881 (primary purpose of street utility charge was to raise revenue because authorizing ordinances made no attempt to regulate residential housing or street usage).

charge is probably a tax in fee's clothing."[27] The Court of Appeals held that the conservation district charge is a fee because the County uses the funds "to manage storm water run off for the benefit of all county **residents**."[28] The mere fact that a charge is used for the benefit of all is not a sufficient basis to conclude that a charge is a fee. Indeed, that fact cuts against the conclusion that the charge is a fee; *taxes* are generally used to fund programs for the benefit of all residents of a jurisdiction. The question is whether the charge, and the amount of the charge, bears a direct relationship to the **payer's** use of the service funded by the charge, or contribution to the burden alleviated by the charge. Here, it simply is not believable to assert that a flat rate charge on Mason County property owners is directly related to any use/burden to be alleviated by the charge.

## CONCLUSION

For the reasons stated above, amicus urges the Court to grant the petition for review.

RESPECTFULLY SUBMITTED this 5th day of February, 2010.

GROEN STEPHENS & KLINGE LLP

By: _____

Richard M. Stephens, WSBA #23776
Brian D. Amsbary, WSBA #36566

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[27] *Samis Land Co.*, 143 Wn.2d at 811.

[28] *Cary*, 152 Wn. App. at 965-66 (emphasis added).

**DECLARATION OF SERVICE**

~~I,~~ Linda C. Hall, declare as follows pursuant to GR 13 and RCW 9A.72.085:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On February 5, 2010, I caused the foregoing document to be served on the following persons via the following means:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 5th day of February, 2010, at Bellevue, Washington.

Linda C. Hall

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Dear Clerk – attached please find (1) Evergreen Freedom Foundation's Motion for Leave to File Amicus Curiae Memorandum in Support of Petition for Review, and (2) Evergreen Freedom Foundation's Amicus Curiae Memorandum in Support of Petition for Review, for filing in Cary v. Mason Conservation District, No. 83937-9.

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